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v.

MAJID SALEH JAHROMI AMROLLAH

COURT OF APPEAL, PUTRAJAYA

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HASAN LAH JCA

ABDUL MALIK ISHAK JCA

AHMAD MAAROP JCA

[CRIMINAL APPEAL NO: B-05-232-2010]

28 APRIL 2011

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 168.73g of Methamphetamine - Trial judge reduced charge to one of possession - Appeal against - Whether trial judge ought to have invoked presumption of trafficking under s. 37(da) against respondent - Respondent's knowledge about drugs in car - Whether respondent had custody and control of drugs - PP v. Abdul Rahim Kalandari Mustan*

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The respondent was jointly charged with one Abdul Latif bin Muhamad Baksh ('Abdul Latif') under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') for trafficking in 168.73g of Methamphetamine ('the said drugs'). ASP Norosid ('PW5') and a team of police officers conducted a surveillance at Jalan Pandan Cahaya whereby PW5 had observed a Proton Waja ('the car') driven by the respondent, was parked on the same stretch of road as PW5's car was parked. Several minutes later, PW5 observed Abdul Latif, who was not carrying any items with him, entered the car from the back passenger door. After several minutes, PW5 approached the respondent and upon examination of the car, PW5 found a paper bag which was folded at the side of the left foot of the respondent and seized the said item. In the paper bag, there was a plastic bag which contained the said drugs as defined in s. 2 of the Act. PW5 testified that on being apprehended, both the respondent and Abdul Latif looked fearful and restless. PW3, who was the managing director of a transport and travel company, testified that the car was rented to the respondent and another person by the name of Hamid for one month starting from 15 November 2008. In the High Court, the learned trial judge acquitted and discharged Abdul Latif but found that the prosecution had proved a *prima facie* case against the respondent for possession of the said drugs and he was ordered

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- A to enter his defence on the reduced charge of possession, an offence which was punishable under s. 39A(2) of the Act. The trial judge held that since the respondent had been found to be in custody and control of the said drugs, by virtue of s. 37(d) of the Act, the statutory presumption of knowledge could be invoked
- B in order to prove possession. Dissatisfied with the decision, the prosecution appealed to this court in respect of the respondent only. The Public Prosecutor submitted, *inter alia*, that: (i) the trial judge had erred in her decision that the respondent did not have *mens rea* possession of the incriminating drugs and (ii) the trial
- C judge ought to have invoked the presumption of trafficking under s. 37(da) of the Act against the respondent.

**Held (dismissing appeal; affirming decision of High Court)
Per Hasan Lah JCA delivering the judgment of the court:**

- D (1) It is trite law that the presumptions in s. 37(d) and s. 37(da) of the Act cannot be applied together to find an accused person guilty of trafficking in drugs under the Act. If the presumption of trafficking was to be invoked, there must first be a factual finding of possession (*PP v. Abdul Rahim Kalandari*
- E *Mustan*; refd). (para 22)
- (2) Based on the prosecution's evidence, the rental for the car was paid by Hamid on 15 November 2008. The respondent was arrested about two weeks later. Hence, there was no
- F evidence to show how often the respondent had been driving the car from 15 November 2008 to the date he was arrested as the said Hamid was not called to testify. (para 31)
- (3) The prosecution's case rested substantially on the evidence of
- G PW5. From the totality of the evidence adduced by the prosecution, the court agreed with the finding of the learned trial judge that the paper bag was under the custody and control of the respondent as he was alone in the car before he was joined by Abdul Latif. There was no reason to doubt
- H PW5's evidence that it was the respondent who drove the car at the relevant time. Further, there was no sufficient evidence to infer knowledge against the respondent. It was not sufficient to rely on PW5's evidence that the respondent looked fearful and restless to infer knowledge against the
- I respondent as that was a matter of perception. (para 35)

- (4) Unlike the facts in *PP v. Abdul Rahman Akif*, the respondent was not the owner of the car. There was no evidence to show as to how long he had been driving the car before he was arrested and who put the paper bag in the car. Although there was physical proximity of the respondent to the paper bag, the evidence showed that the bag was folded and it was not concealed. (para 36) A B
- (5) Having subjected the prosecution's evidence to a maximum evaluation, this court had no reason to disagree with the finding of the learned trial judge on the issue of knowledge. It had not been proved that the respondent knew the paper bag contained the incriminating drugs. Hence, the trial judge had correctly invoked the presumption under s. 37(d) of the Act against the respondent. (para 37) C
- (6) When the respondent was arrested, he was carrying the drugs and by definition, trafficking includes "carrying". The quantity of the said drugs was in excess of the minimum statutory weight of trafficking of 50g Methamphetamine. However, there was no further evidence to show that the respondent was carrying the incriminating drugs for the purpose of delivering it to a purchaser. (para 40) D E

Bahasa Malaysia Translation Of Headnotes

Responden telah dituduh bersama-sama dengan seorang bernama Abdul Latif bin Muhamad Baksh ('Abdul Latif') di bawah s. 39(B)(1)(a) Akta Dadah Berbahaya 1952 ('Akta') untuk pengedaran 168.73g Methamphetamine ('dadah tersebut'). ASP Norosid ('PW5') dan sepasukan pihak polis telah menjalankan satu pengawasan di Jalan Pandan Cahaya di mana PW5 telah membuat pemerhatian terhadap sebuah kereta Proton Waja ('kereta') yang dipandu oleh responden, diletak sama baris dengan kereta PW5. Beberapa minit kemudian, PW5 pula telah memerhati Abdul Latif, yang tidak membawa apa-apa barang bersamanya, memasuki kereta itu dari bahagian pintu belakang. Selepas beberapa minit, PW5 menghampiri responden dan atas pemeriksaan kereta yang dilakukan, PW5 telah menjumpai satu beg kertas dalam keadaan terlipat berada di bahagian kiri kaki responden dan lalu merampas barang tersebut. Di dalam beg kertas itu, terdapat satu beg plastik yang mengandungi dadah tersebut, seperti yang ditakrif di bawah s. 2 Akta. PW5 memberi keterangan bahawa semasa ditahan, F G H I

- A kedua-dua responden dan Abdul Latif kelihatan takut dan gelisah. PW3, yang merupakan pengarah pengurusan sebuah syarikat pengangkutan dan perjalanan, memberi keterangan bahawa kereta itu telah disewa oleh responden dan seorang lagi bernama Hamid untuk tempoh sebulan bermula dari 15 November 2008. Di
- B Mahkamah Tinggi, yang arif hakim perbicaraan melepas dan membebaskan Abdul Latif tetapi mendapati bahawa pihak pendakwaan telah membuktikan kes *prima facie* terhadap responden untuk pemilikan dadah dan diperintah untuk memasukkan pembelaannya terhadap tuduhan yang dikurangkan kepada
- C pemilikan, suatu kesalahan yang boleh dihukum di bawah s. 39A(2) Akta. Hakim perbicaraan memutuskan bahawa memandangkan responden telah dijumpa berada dalam jagaan dan kawalan dadah tersebut, menurut s. 37(d) Akta, anggapan statutori bagi pengetahuan boleh dibangkitkan bagi membuktikan pemilikan. Tidak
- D puas hati dengan keputusan itu, pihak Pendakwa Raya telah merayu ke mahkamah ini terhadap responden sahaja. Pihak Pendakwa Raya berhujah, antara lain, bahawa (i) hakim perbicaraan gagal dalam memutuskan yang responden tidak mempunyai *mens rea* pemilikan bagi dadah terbabit; dan (ii) hakim
- E perbicaraan sepatutnya membangkitkan anggapan pengedaran di bawah s. 37(da) Akta terhadap responden.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)

- F **Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:**
- (1) Adalah undang-undang nyata bahawa anggapan di bawah s. 37(d) dan s. 37(da) tidak boleh dipakai bersama-sama supaya seseorang tertuduh didapati bersalah mengedar dadah
- G di bawah Akta. Jika anggapan pengedaran dibangkitkan, perlu ada pertamanya dapatan faktual untuk pemilikan. (*PP v. Abdul Rahim Kalandari Mustan*; dirujuk).
- (2) Berdasarkan keterangan pihak Pendakwa Raya, sewa kereta
- H telah dibayar oleh Hamid pada 15 November 2008. Responden telah ditangkap kira-kira dua minggu kemudian. Oleh itu, tiada keterangan untuk menunjukkan kekerapan responden memandu kereta itu dari 15 November 2008 sehingga tarikh beliau ditangkap memandangkan Hamid tidak
- I dipanggil untuk memberi keterangan.

- (3) Kes pihak Pendakwa Raya hanya bergantung kepada keterangan PW5. Daripada keseluruhan keterangan yang dikemukakan oleh pihak Pendakwa Raya, mahkamah telah bersetuju dengan dapatan yang arif hakim perbicaraan bahawa beg kertas itu berada di bawah jagaan dan kawalan responden kerana hanya beliau berada di kereta sebelum disertai oleh Abdul Latif. Tiada sebab untuk meragui keterangan PW5 bahawa adalah responden yang telah memandu kereta itu pada masa tersebut. Lagipun, tiada keterangan memadai untuk membuat kesimpulan pengetahuan terhadap responden. Adalah tidak mencukupi untuk bergantung kepada keterangan PW5 bahawa responden kelihatan takut dan gelisah untuk membuat kesimpulan pengetahuan terhadap responden memandangkan ia adalah suatu tanggapan. A B C
- (4) Berbeza daripada fakta di dalam *PP v. Abdul Rahman Akif*, responden bukanlah pemilik kereta itu. Tiada keterangan yang menunjukkan berapa lama responden telah memandu kereta itu sebelum ditangkap dan siapa yang meletak beg kertas itu ke dalam kereta. Walaupun terdapat pendekatan fizikal responden dan beg kertas tersebut, keterangan menunjukkan bahawa beg itu berada dalam keadaan terlipat dan tidak tersembunyi. D E
- (5) Dengan mengambil keterangan pihak Pendakwa Raya atas penilaian maksima, mahkamah ini tidak mempunyai sebarang sebab untuk tidak menyetujui dapatan yang arif hakim perbicaraan terhadap isu pengetahuan. Tidak dibuktikan bahawa responden mengetahui beg kertas mengandungi dadah terbabit itu. Oleh itu, yang arif hakim telah dengan betul membangkitkan anggapan di bawah s. 37(d) Akta terhadap responden. F G
- (6) Apabila responden ditangkap, beliau membawa dadah dan mengikut tafsiran, pengedaran merangkumi “membawa”. Kuantiti dadah tersebut adalah melebihi berat minima statutori pengedaran bagi 50g Methamphetamine. Walaubagaimanapun, tiada keterangan lanjut untuk menunjukkan bahawa responden membawa dadah terbabit itu untuk tujuan penghantaran kepada pembeli. H

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A Case(s) referred to:

Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC (*refd*)

Lim Kheak Teong v. PP [1984] 2 CLJ 219 [1984] 1 CLJ (Rep) 207 FC (*refd*)

Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA (*refd*)

B *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181 PC (*refd*)

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC (*refd*)

PP v. Abdul Rahim Kalandari Mustan [2008] 5 CLJ 108 FC (*refd*)

PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC (*dist*)

Legislation referred to:

C Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da), 39A(2), 39B(1)(a)

For the appellant - Samihah Rhazali DPP

For the respondent - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-242-2008]

D *Reported by Kumitha Abd Majid*

JUDGMENT

E Hasan Lah JCA:

Background

F [1] The respondent was jointly charged with Abdul Latif bin Muhamad Baksh (“Abdul Latif”) with trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (“the Act”) in the High Court at Shah Alam for trafficking in 168.73 grammes of Methamphetamine.

G [2] The charge against them reads as follows:

H Bahawa kamu bersama-sama pada 28.11.2008 jam lebih kurang 10.15 malam, di hadapan Medan Selera, Cahaya Food Court 128, Jalan Pandan Cahaya 2/2, Ampang, di dalam daerah Hulu Langat, dalam negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya, iaitu 168.73 gram Methamphetamine, suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibacakan bersama seksyen 34 Kanun Keseksaan.

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[3] After the conclusion of the case for the prosecution the learned trial judge acquitted and discharged Abdul Latif without calling his defence. With respect to the respondent, the learned trial judge held that the prosecution had failed to prove a *prime facie* case of trafficking but found that a *prima facie* case of possession had been proved. The respondent was ordered to enter his defence on the reduced charge of possession, an offence under s. 12(2) and punishable under s. 39A(2) of the Act.

[4] The Public Prosecutor had appealed against the learned trial's judge decision in respect of the respondent only.

[5] We heard the appeal and dismissed it. We now give the grounds of our decision.

Prosecution's Case

[6] On 28 November 2008, at about 9pm ASP Norosid bin Hj Mamat (PW5) and a team of police officers from IPK Selangor conducted a surveillance at Jalan Pandan Cahaya 2/2, Taman Cahaya Ampang. Approximately 15 minutes after his arrival PW5 observed a dark Proton Waja with registration number WPH 4986 ('the Proton car') driven by the respondent. The Proton car stopped and parked on the same stretch of road as PW5's car was parked at a distance of approximately four cars in front of SP5's car.

[7] Approximately 15 minutes after the arrival of the Proton car, SP5 observed Abdul Latif walking from the direction of Restoran Cahaya Food Court 128, located across the road, towards the Proton car. On arrival, Abdul Latif entered the Proton car from the back passenger door on the left side. Abdul Latif was not carrying any items.

[8] After 2-3 minutes, PW5 directed his team to block the Proton car. PW5 then approached the respondent and ordered him to open the door of the car. On the door being opened, PW5 found the respondent with a 2 year old boy (his son) on his lap, while Abdul Latif was seated on the back passenger seat.

[9] PW5 then entered the Proton car through the front door on the left. On examination of the car, PW5 found a black and white 'Guess' paper bag (exh. P9) at the side of the left foot of the respondent. The bag was folded. PW5 seized the bag. No other items were found in the Proton car.

A [10] Outside the Proton car, PW5 examined the contents of the paper bag in the presence of the respondent and Abdul Latif and other police officers. It contained a Tesco plastic bag (exh. P11) which contained clear crystals which were suspected to be illicit drugs.

B [11] PW5 testified that on being apprehended both the respondent and Abdul Latif looked “ketakutan dan gelisah” (fearful and restless). They both denied any knowledge of the contents of the paper bag. They were then arrested and together with the
C drug exhibits were brought to the Ampang Police Station where they were handed over to the investigating officer, Inspector Nurul Aizar bin Abdul Rahman (PW7).

[12] The respondent was an Iranian and Abdul Latif was a Pakistani.

D [13] On 3 December 2008, PW7 handed the drug exhibits to the Government Chemist (PW8) at the Jabatan Kimia Petaling Jaya for analysis. On analysis, PW8 confirmed that the clear crystals was Methamphetamine as defined in s. 2 of the Act with a nett
E weight of 168.73 grammes.

[14] Seyed Reza Seyed Ghassem Seyed (PW3) was the Managing Director of Rezack Transport & Travel Sdn Bhd. He testified that the Proton car was rented to the respondent and
F another person by the name of Hamid for one month starting from 15 November 2008. He received the payment of RM1,700 from Hamid for one month’s rental of the Proton car.

Findings Of The High Court

G [15] The learned trial judge found Abdul Latif did not have custody and control of the paper bag P9. Abdul Latif had entered the Proton car just 2-3 minutes before PW5 apprehended him and the respondent. The learned trial judge further held that the evidence that Abdul Latif looked fearful and restless without more
H could not be taken to point undoubtedly to guilty knowledge on his part. Abdul Latif was therefore acquitted and discharged at the close of the case for the prosecution.

I [16] With regard to the respondent, the learned trial judge found the respondent had custody and control of P11 (and P9). The learned trial judge was of the view that the respondent had a power of disposal over the drugs in question due to the proximity of the paper bag P9 to the respondent and the absence of others to whom custody might be attributed.

[17] With regard to knowledge, the learned trial judge found that there was no sufficient evidence to infer knowledge against the respondent that he knew the contents of the paper bag P9. As such, the learned trial judge invoked the presumption of possession under s. 37(d) of the Act against the respondent.

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[18] With regard to trafficking, the learned trial judge held that there was no evidence to prove that the respondent was trafficking in the incriminating drugs.

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[19] The charge against the respondent was accordingly reduced to a charge of possession of the incriminating drugs.

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The Appeal

[20] The learned Deputy Public Prosecutor submitted that the learned trial judge had erred in her decision that the respondent did not have *mens rea* possession of the incriminating drugs. She contended that on the evidence available the prosecution had proved *mens rea* possession against the respondent. She further submitted that as the prosecution had proved *mens rea* possession of the incriminating drugs against the respondent the trial judge ought to have also invoked the presumption of trafficking under s. 37(da) of the Act against the respondent.

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[21] Alternatively, the learned Deputy Public Prosecutor contended that the prosecution had adduced sufficient evidence of trafficking as defined under s. 2 of the Act by applying the “purpose approach” enunciated by the Privy Council in *Ong Ah Chuan v. Public Prosecutor & Another Appeal* [1980] 1 LNS 181.

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Finding Of This Court

[22] It is trite law that the presumptions in ss. 37(d) and 37(da) of the Act cannot be applied together to find an accused person guilty of trafficking in drugs under the Act. If the presumption of trafficking was to be invoked there must first be a factual finding of possession (see *PP v. Abdul Rahim Kalandari Mustan* [2008] 5 CLJ 108).

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Knowledge Of Drugs

[23] The learned trial judge, after scrutinising the entire evidence before the court to see whether an inference could be drawn against the respondent that he knew about the drugs in the paper bag P9, said:

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- A The element of knowledge cannot be proved by direct evidence but is to be inferred from the surrounding circumstances. (*Chan Pean Leon v. PP* [1956] MLJ 237. From the evidence of SP7, on being confronted by the contents of the bag, the first accused had looked fearful and restless. The paper bag was proximate to the first accused leg but was in a folded position. The first accused
- B had denied knowledge and did not attempt to flee. SP5's testimony that the second accused looked fearful and restless without more cannot be taken to point undoubtedly to guilty knowledge on his part. *Parlen Dadeh v. PP* [2009] 1 CLJ 717.
- C The drugs were not concealed, but were in a paper bag that was folded and located at the foot of the driver's seat. I therefore find there is insufficient evidence to infer that the first accused had *mens rea* knowledge of the nature of the contents of the paper bag.
- D Since the 1st accused has been found to have custody and control of the said drugs, by virtue of s. 37(d) of the DDA 1952 the statutory presumption of knowledge can be invoked in order to prove possession. I therefore find that a *prima facie* case of possession has been established against the 1st accused.
- E [24] The paper bag P9 which contained the plastic bag P11 was found at the footwell of the driver's seat of the Proton car. The respondent was at the driver's seat and he was seen driving the car immediately before he was apprehended by PW5. It is not in dispute that the paper bag was proximate to the respondent but
- F in a folded position. On being apprehended by PW5 both Abdul Latif and the respondent looked fearful and restless.
- G [25] In *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 the respondent was arrested at about 3.30am, moments after alighting from the car he was driving. Upon searching the car, the police party found cannabis under the driver's and the front passenger's seats. The respondent was charged with and convicted of an offence of trafficking in the said drugs and was sentenced to death. The learned High Court judge found, *inter alia*, that the
- H respondent must have custody and control of the drugs since he was alone at the material time and was in possession of the car for seven months prior to his arrest. The learned High Court judge also rejected the respondent's story that although he knew about the existence of the packages in the car he did not know
- I that they contained cannabis.

[26] On appeal to the Federal Court, Arifin Zakaria FCJ (as he then was) had this to say: A

It is trite that what constitutes “possession” under s. 37 of the Act is a question of law. (See *Yee Ya Mang v. Public Prosecutor* [1972] 1 MLJ 120 and *Public Prosecutor v. Badrulsham bin Baharom* [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something. And in relation to drug found in a vehicle Shankar J in *Pendakwa Raya v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557, after considering a number of authorities, stated: B
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... those cases do not decide that in all cases a person who is in sole charge of a vehicle cannot be found to be in possession of articles being carried in it. As Thomson J himself said in *Tong Peng Hong v. PP* at p 233:

If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it ... D
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Again, at p. 234:

I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disproof or explanation lead the court to the conclusion, quite independently of any statutory presumption, that it was in the possession of the person in control of the vehicle. F

Therefore, the presence of the 3 packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature. (See also *Lim Beng Soon v. Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge ... G
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Further down, the learned judge ruled:

Applying the observations set out in the authorities cited above to the facts in the present case, the irresistible inference that may be drawn in the circumstances is that the respondent all along knew about the drug found in the car. The fact that they were found I

A hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. From the evidence of PW5 it is clear that little effort was required to uncover what was contained in the 3 packages. Therefore, we are of the view that on the facts and in the circumstances of this case the learned trial judge, properly directed on the law, would have come to the finding that *prima facie* the respondent had possession of the drug independent of the statutory presumption under s. 37(d) of the Act.

[27] In *Surentheran Selvaraja v. PP* [2005] 2 CLJ 264, the police, on 13 July 2000, found the appellant with a plastic bag that contained 40 small packets of drugs in powder and granular form in a car driven by the appellant. The bag was found between the feet of the appellant below the driver's seat where the appellant was seated. The appellant was driving the car, with no one else with him. He had been the registered owner of the car since 1999. The Sessions Court found proof of possession and convicted him under s. 12(2) of the Act for unlawful possession of 6.44 grammes of a mixture of heroin and monoacetylmorphines and sentenced him under s. 39A(2) of the Act. His appeal was dismissed by the High Court. On further appeal to the Court of Appeal, the Court of Appeal dismissed his appeal against conviction but allowed his appeal against sentence.

[28] With regard to knowledge Abdul Aziz Mohamad JCA (as he then was) observed:

F In the present case, the inescapable inference from the fact that the bag was so placed in relation to the appellant in the car as has been described can only be that he knew of the existence of the bag. From the fact that he allowed the bag to remain there while he was driving, whereas normally a driver would not allow an object to remain on the floor in his part of the car to be a potential obstruction to his footwork while driving, the inescapable inference is that he willed the bag to be there in order to guard it and that therefore he was in custody or control of it. From the fact that it was his own car that he was driving and that there was no one else in the car, the inescapable inference is that he alone was concerned in the presence of the bag in the car. From the fact that he needed to guard the bag, the inescapable inference is that he knew that the bag contained packets of the dangerous drugs. It was not for the court, at the close of the prosecution case, to provide a defence for the appellant and speculate on the probability that, for example, someone else had left the bag in the

appellant's car without his knowledge. Unless there were elements in the evidence of the prosecution case itself pointing to such a probability, it must not be entertained. In this appeal nothing has been pointed out from the evidence for the prosecution as indicating, against the inescapable inference against him, a probability that the appellant had no knowledge of the existence of the drugs. We are therefore satisfied that the Sessions Court judge was right in finding at the close of the prosecution case that the prosecution had established possession by evidentiary proof, and we accordingly dismiss the appeal as regards conviction.

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[29] In *Parlan Dadeh v. PP* [2009] 1 CLJ 717 the Federal Court held that proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge. With regard to the accused's conduct the Federal Court had this to say:

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The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s. 8 it is admissible. *It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required.* Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9. Such explanation must not be in their barest possible form, but a reasonable fullness of detail and circumstance (see *R v. Stephenson* [1904] 68 JP 542). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage. However, the evidence admissible under the section must be confined to what is necessary for the purposes enumerated ... (emphasis added).

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[30] The Federal Court further observed:

In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn

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A by him. The explanation for his reaction must therefore be offered
by he himself as required by s. 9. The court cannot, on its own,
offer an explanation for his reaction. However, in his defence the
appellant did not offer any explanation at all for his reaction upon
being approached by the police. It can therefore be validly used
B as evidence against him. The inference to be drawn from the
evidence of conduct of the appellant against the background of the
other evidence is that he knew what he was carrying (see *DPP v.*
Brooks [1974] 2 All ER 840). It follows that the stand taken by
the appellant in relation to the evidence of conduct is not
C sustainable. Be that as it may, the evidence of conduct in this
case is not very significant in view of the manner in which the
appellant carried the drugs on his person from which it can
reasonably be inferred that he had knowledge of the drugs in his
possession (see the cases referred to earlier, and, in particular,
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 and *PP v. Abdul*
Rahman Akif [2007] 4 CLJ 337).
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[31] From the prosecution's own evidence, the rental for the
Proton car was paid by a person by the name of Hamid on
15 November 2008. The respondent was arrested with the
incriminating drugs in the Proton car about two weeks later. There
E was no evidence to show how often the respondent had been
driving the Proton car from 15 November 2008 to the date he
was arrested as Hamid was not called to testify. In fact the
investigating officer did not investigate this person. Under cross-
examination of PW7, it was suggested to PW7 that Hamid was
F also an Iranian and the drug belonged to Hamid.

[32] The Proton car arrived at the scene 15 minutes after PW5
and his party took their position there. PW5 saw the driver of the
Proton car. The Proton car was then parked in front of PW5's
G car. About 15 minutes later Abdul Latif walked to the Proton car
and entered the Proton car from the back passenger door on the
left side. PW5 later found the driver was the respondent. There
was a two year old boy on the respondent's lap. Abdul Latif was
seated on the back passenger seat.

H [33] PW5 found P9 at the side of the left foot of the respondent.
It was folded. According to PW5 both the respondent looked
fearful and restless ("ketakutan dan gelisah"). PW5 testified both
of them said something to him but he could not remember what
I they said.

[34] Under cross-examination learned counsel for the respondent put to PW5 that the Proton car arrived at the place first before PW5 and his team arrived and the car was driven by Hamid. PW5 denied that. It is pertinent to take into consideration the following evidence from PW5 which can be found at p. 34 of the Appeal Record:

Q: Selepas barang kes dijumpai ada beritahu kedua-dua OKT ini barang dadah?

A: Ya.

Q: Masa itu kedua-dua OKT takut dan kata mereka langsung tak tahu sebenarnya apakah benda itu, betul?

A: Ya, betul.

[35] The prosecution's case rested substantially on the evidence of PW5. From the totality of the evidence adduced by the prosecution we agreed with the finding of the learned trial judge that the paper bag P9 was under the custody and control of the respondent as the respondent was alone in the Proton car (before he was joined by Abdul Latif). There was no reason to doubt PW5's evidence that it was the respondent who drove the Proton car at the relevant time. We also agreed with the learned trial judge's finding that there was no sufficient evidence to infer knowledge against the respondent. There was no evidence of positive conduct on the part of the respondent like attempting to escape or struggling when apprehended by PW5 from which it could be safely inferred that the respondent knew about the drugs in P9. It is not sufficient to rely on PW5's evidence that the respondent looked fearful and restless to infer knowledge against the respondent as that is a matter of perception. Furthermore, the contemporaneous conduct of the respondent was consistent with his innocence. On being apprehended by PW5 the respondent told PW5 that he did not know that there were drugs in P9.

[36] Unlike the facts in *Abdul Rahman Akif*, the respondent was not the owner of the car. There was no evidence to show how long he had been driving the Proton car before he was arrested. What we had was that another Iranian by the name of Hamid paid for the rent of the Proton car. There was no evidence who put the paper bag P9 in the car. There was no evidence of

A fingerprints on P11. Although there was physical proximity of the respondent to the paper bag P9 the evidence showed that the bag was folded and it was not concealed.

B [37] Having subjected the prosecution's evidence to a maximum evaluation we had no reason to disagree with the finding of the learned trial's judge on the issue of knowledge. It had not been proved that the respondent knew P9 contained the incriminating drugs. The learned trial judge, in our view, had correctly invoked the presumption under s. 37(d) of the Act against the respondent.

C **Trafficking**

D [38] We turn now to the argument on trafficking. The learned Deputy Public Prosecutor, as stated earlier, contended that the respondent was carrying ("mengangkut") 168.73 grammes of Methamphetamine for the purpose of trafficking. In support of that the learned Deputy Public Prosecutor relied on the case of *Ong Ah Chuan* where Lord Diplock, at p. 69 said:

E As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that section 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under section 15. In the instant cases, however, the quantities involved were respectively one hundred times and six hundred times the statutory minimum.

G [39] We pause here to say that the observation made by Lord Diplock must be considered in the light of the accused's defence that the drug was for his personal consumption.

H [40] In the instant appeal when the respondent was arrested he was carrying the drugs and by definition trafficking includes "carrying". The quantity of the drugs was in excess of the minimum statutory weight of trafficking of 50 grammes of Methamphetamine. However, there was no further evidence to show that the respondent was carrying the incriminating drugs for the purpose of delivering it to a purchaser.

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[41] On this issue the learned trial judge made the following finding: A

Thus, in order to prove the offence of trafficking against the 1st accused it is not sufficient to prove a mere passive possession of the drugs. (*PP v. Hairul Din Zainal Abidin* [2001] 6 MLJ 146. He must be proved to have committed any of the overt acts enumerated above. There has been no evidence led that the first accused was 'concealing', transporting' or 'delivering' the contents of the paper bag from one place to another or one person to another. The accused was apprehended only about an hour after the car driven by the accused was sighted. The second accused had entered the car only 2-3 minutes before being apprehended. The fleeting meeting between the first and second accused is insufficient to enter the intention to convey the drugs from the first to the second accused. B C

Thus I find no evidence that the first accused was 'trafficking' in the abovementioned drugs. D

[42] In *Ong Ah Chuan* Lord Diplock, at p. 68, had this to say:

To "traffic" in a controlled drug so as to constitute the offence of trafficking under section 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (a) of the definition of "traffic" and "trafficking" in section 2. Even apart from any statutory definition, the ordinary meaning of the verb "to traffic", in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself ... E F G

[43] In *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65 the Court of Appeal held that whether an accused person is a trafficker depends on the facts and circumstances of the case, including the quantity of the drugs and any transaction he proposed to enter into. Looking at the totality of the evidence before the court we were unable to agree with the learned Deputy Public Prosecutor's contention that there was an affirmative act of trafficking by the appellant. In our view there was nothing to show that the appellant proposed to enter or had entered into any form of transaction involving the incriminating drugs. H I

A Conclusion

[44] The issues raised in the instant appeal involved the finding of facts by the learned trial judge. It is trite law that the appellate court should be slow in interfering with the findings of facts by the trial judge who had the advantage of seeing and hearing the witnesses. (see *Lim Kheak Teong v. PP* [1984] 2 CLJ 219 [1984] 1 CLJ (Rep) 207; *Herchun Singh & Ors v. PP* [1969] 1 LNS 52). We found that the learned trial judge had appreciated the correct law when discussing the legal issues involved and she had carefully considered the evidence and made the right finding of facts.

[45] For the reasons given we affirmed the decision of the learned trial judge and dismissed the appeal by the Public Prosecutor.

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E**F****G****H****I**